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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE NISHAKAWA,

Defendant and Appellant.

B286108

(Los Angeles County  
Super. Ct. No. LA082572)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Remanded and Affirmed.

Eric E. Reynolds, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, and Lance E. Winters, Deputy Attorney General, for Plaintiff and Respondent.

By information, defendant Jesse Nishakawa was charged with one count of first degree burglary (§ 459).<sup>1</sup> It was also alleged that a person other than an accomplice was present inside the residence at the time of the burglary (§ 667.5, subd. (c)(21)), and that defendant had a prior strike conviction (§§ 667, subds. (b)-(j); 1170.12), and a serious felony conviction (§ 667, subd. (a)).

On October 5, 2016, the trial court declared defendant to be incompetent under section 1368 and suspended criminal proceedings. Defendant was returned to court from Patton State Hospital on January 17, 2017. The trial court found him to be competent and reinstated proceedings.

Following defendant's waiver of his right to a jury trial, he was tried by the court and convicted of first degree burglary. The court also found true the person-present allegation. Appellant later admitted his prior convictions.

The trial court denied defendant's motion to strike his prior strike conviction, and sentenced him to a total of 9 years in state prison: the low term of 2 years for the burglary, doubled under the Three Strikes law, plus 5 years for the section 667, subdivision (a) prior. Appellant filed a timely notice of appeal.

## **BACKGROUND**

Around 6:30 a.m. on January 9, 2016, Roberta Baldi was in the bedroom of her home on Big Rock Drive in Malibu when she heard a

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<sup>1</sup> All section references are to the Penal Code.

loud “boom” and her dogs barking. After exiting her front door, she saw appellant standing on the roof of her garage. She asked what he was doing and he responded that he was looking for someone: he used the word “Mr.”, but she could not remember the name. When Ms. Baldi said she was calling the police, defendant jumped off the roof, and then jumped over the front gate.

A few minutes later, Los Angeles County Sheriff’s Deputies arrived at the house. They detained defendant on the street approximately 200 feet from the home.

Later, Ms. Baldi noticed that a screen door for a sliding glass door had been removed, and there was a shoe print outside a downstairs window and a palm print outside on an upstairs window. The house had an enclosed patio accessible only through a gate. The gate leading to the patio was open. It could only be unlocked from inside the patio. It had been locked when Ms. Baldi went to bed.

In his defense, defendant testified that that he had received mental health treatment since he was 19 years old. However, at the time of the incident, he was homeless, had not been taking his medication, and was hearing voices. The night before the incident at Ms. Baldi’s residence, he smoked methamphetamine with a woman on the pier. After arguing with her, he walked up the beach for two hours, eventually walking up a path leading away from the beach. He saw a man standing in front of a gate holding a wooden staff. The man asked defendant if he could have a hit off of his pipe. After defendant gave the man his pipe, the man said that he would reward defendant for his “mission” for God. Defendant picked two “cherry bombs” off the man’s

staff. Defendant broke his pipe on the ground, then jumped over the gate.

He then heard voices telling him that he needed to get inside the house, because a woman named Bunny with whom he was close was inside and in trouble. The voices said that there were bombs inside the house and that Bunny was going to be killed. Defendant ran to the back of the house and kicked a window. He then climbed up onto the roof. He never touched the sliding screen door and did not recall going into the enclosed patio. When Mrs. Baldi came outside, she had a small child with her. Defendant was confused because the woman was not Bunny. He said, “That’s not Bunny,” and left.

He did not intend to steal anything inside the house. When the police found him, he was sitting not far from the house crying because he thought Bunny was dying.

## **DISCUSSION**

Initially, defendant’s appointed counsel on appeal filed a *Wende* brief (*People v. Wende* (1979) 25 Cal.3d 436), requesting that we independently review the record to determine whether there are any arguable issues on appeal. Defendant was informed of his right to file a supplemental brief, but did not do so. After completing our review, we requested briefing on whether the case must be remanded for the trial court to exercise its discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.; “SB 1393”) whether to strike the five-year enhancement under section 667, subdivision (a). We have received briefing on that issue from the parties, and conclude that remand is appropriate.

As we have noted, defendant admitted a prior serious felony conviction. (§ 667, subd. (a).) The trial court imposed a five-year term on this enhancement. Effective January 1, 2019 (after appellant’s sentencing), SB 1393 deleted former subdivision (b) of section 1385, which precluded the trial court from striking the five-year enhancement for a prior serious felony conviction under section 667, subdivision (a). With the deletion of subdivision (b) of section 1385, the trial court now has discretion to strike a section 667, subdivision (a) enhancement. At the time of appellant’s sentencing, the trial court had no such discretion.

Defendant’s case was not final before the effective date of SB 1393 (January 1, 2018), and therefore defendant is entitled to the ameliorative effect of that enactment.<sup>2</sup> The question is whether a remand is required. In the analogous situation involving the enactment of SB 620, which gave the trial court discretion to strike firearm enhancements under section 12022.5 and 12022.53, courts have held that a remand to allow the trial court to exercise that discretion “is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court’s intent, remand is required when the trial court is

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<sup>2</sup> “A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired.” (*People v. Buycks* (2018) 5 Cal.5th 857, 876, fn. 5.) The time to file a petition for certiorari expires 90 days after our opinion is filed—longer, if the defendant files a petition for review. (U.S. Supreme Ct. Rules, rule 13(1), (3).) That takes finality well into 2019.

unaware of its sentencing choices.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-428; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)

Here, there is no such indication in the record, and the People concede that a remand is appropriate. We agree, and remand the case for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement.

We have independently reviewed the record, and find no other arguable issues on appeal.

### **DISPOSTION**

The case is remanded for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement. In all other respects, the judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

MICON, J.\*

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\*Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.